MAYBAN FINANCE BHD

v.

WONG GIENG SUK & ANOR

HIGH COURT MALAYA, PULAU PINANG
SU GEOK YIAM JC
[SUIT NO: 22-181-99]
18 OCTOBER 2002

CIVIL PROCEDURE: *Summary judgment - Triable issues - Action by plaintiff bank for recovery of loan given to defendant - Whether defendant raised triable issues - Whether plaintiff varied interest rates without giving notice to defendant - Whether certificate of indebtedness conclusive against defendant - Whether action should go to trial*

This was an appeal by the plaintiff/bank to the judge-in-chambers from the decision of the deputy registrar dismissing its application for summary judgment to be entered against the defendants/borrowers. The plaintiff's claim was for the recovery of moneys under two loans (a housing loan and a revolving loan) it had granted to the defendants. In resisting the plaintiff's O. 14 application, the defendants contended, *inter alia*, that the plaintiff had varied the interest rates of both the loan facilities without giving prior notice to them; that the variation of the interest rates by the plaintiff was unilateral and unlawful; that they had not been served with notices of demand, or, alternatively, that such notices of demand would be unlawful; and that the certificate of indebtedness was neither final nor conclusive.

Held:

[1] Under the terms of the loan agreements, the plaintiff's right to vary the interest rates, *albeit* at its absolute discretion, was subject to the service of a notice in writing on the defendants. Further, it would also appear, from the terms of the loan agreements, that the amended or varied rates of interest would only take effect as of the date specified in such a notice. (pp 32 h & 33 a)

[2] The certificate of indebtedness was **not** a final and conclusive statement of the amount due and owing by the defendants to the plaintiff. This was because the very names of the plaintiff and the defendants were **not** even mentioned in the certificate. Instead, the name of a company was mentioned. (pp 33 e-h & 34 c-d)

[3] Consequently, the defendants had succeeded in raising two triable issues, *ie*, whether the plaintiff was legally entitled to vary the interest rates of the loan facilities without giving prior notice to the defendants, and, whether the certificate of indebtedness was a final and conclusive statement of the amount due and owing by the defendants to the plaintiff. This was, therefore, not a case in which summary judgment would be proper. (pp 35 c, h & 36 b)

[Plaintiff's appeal dismissed.]

Case(s) referred to:

Chen Heng Ping v. Intradagang Merchant Bankers (M) Bhd [1995] 3 CLJ 690 ***(refd)***

Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467 ***(refd)***

Credit Corporation (M) Bhd v. Lucky Height Development Sdn Bhd & Ors [1996] 4 MLJ 556 ***(refd)***

D & C Nomura Merchant Bankers Bhd v. Gunung Kuari Sdn Bhd & Ors [1990] 2 CLJ 58; [1990] 1 CLJ (Rep) 752 ***(refd)***

Oriental Bank Bhd v. Jaafar Sidek & Mohd Salam & Ors [1990] 2 CLJ 72; [1990] 2 CLJ (Rep) 585 ***(refd)***

For the plaintiff - Jacy Rani Paloosamy; M/s Shahrizat & Tan
For the defendants - V Amareson; M/s Amareson & Meera

Reported by Gan Peng Chiang

JUDGMENT

Su Geok Yiam JC:

This is an appeal to the judge in chambers (encl. 20) against the decision of the learned deputy registrar dated 5 December 2001 dismissing with costs the plaintiff's application for summary judgment (encl. 15) against the defendants for a sum of RM328,898.44 together with interest thereon and costs.

On 17 October 2002 after hearing submissions from both learned counsels I dismissed the appeal with costs. I now give my reasons.

I am satisfied that the respondents who are the defendants in this civil suit have succeeded in raising two triable issues and that, therefore, the claim against the respondents by the appellants who are the plaintiffs in this civil suit should proceed to trial.

The background of the plaintiff's claim is as follows:

By a letter of offer dated 10 July 1995 and a loan agreement cum deed of assignment dated 11 July 1995 the plaintiff, a licensed finance company, gave to the defendants a housing loan of RM186,499 inclusive of a mortgage reducing policy of RM9,499 payable by 240 fixed equal monthly installments of RM1,703 each commencing one month after the loan had been fully disbursed to the defendants.

By a second letter dated 5 October 1996 and a loan agreement dated 30 November 1996 the plaintiff gave to the defendants a revolving loan facility up to a limit of RM60,000 payable on demand.

The defendants having defaulted in the repayment of both the loan facilities, the plaintiffs served two notices of demand on the defendants at the defendants' address of service as stated in the loan documents.

In their 1st notice of demand dated 14 February 1998 the plaintiff claimed a sum of RM232,638.47 in respect of the housing loan and also terminated the housing loan facility.

In their second notice of demand dated 18 January 1999 the plaintiff claimed a sum of RM65,930.26 in respect of the revolving loan facility as at 13 January 1999 and also terminated the revolving loan facility.

Upon the defendants' failure to comply with both the notices of demand the plaintiff filed this civil suit on 11 March 1999 to claim the following reliefs:

(a) Penghakiman untuk jumlah RM328,898.44;

(b) Bunga atas jumlah RM262,289.23 pada kadar 10.00% setahun dikira atas dasar baki bulanan mulai dari 13hb Februari, 1999 hingga tarikh penyelesaian;

(c) Bunga atas jumlah RM66,609.21 pada kadar 11.00% setahun dikira atas dasar baki bulanan mulai dari 13hb Februari, 1999 hingga tarikh penyelesaian;

(d) Bunga tambahan atas jumlah RM60,138.64 pada kadar 1.00% setahun dikira atas dasar baki bulanan mulai dari 13hb Februari, 1999 hingga tatikh penyelesaian;

(e) Bunga tambahan atas jumlah RM6,609.21 pada kadar 1.00% setahun dikira atas dasar baki bulanan mulai dari 13hb Februari, 1999 hingga tarikh penyelesaian;

(f) Kos peguam – Anak Guaman;

(g) Apa-apa relief selanjutnya dan yang lain sebagaimana yang difikirkan patut oleh Mahkamah.

The sum of RM328,898.44 comprises the following:

BUTIR-BUTIR

Pinjaman Perumahan

Jumlah yang terhutang	RM202,150.59
Campur: Ansuran Tertunggak	RM 59,605.00
Penalti Debit	RM 533.64
	RM262,289.23

Pinjaman Berpusar

Jumlah yang terhutang	RM60,000.00
Campur: Ansuran Tertunggak	RM 6,286.96
Penalti Debit	RM 322.25
	RM66,690.21

The writ of summons and statement of claim were served on the defendants by substituted service as both the defendants had shifted to a new address.

On 15 March 2001 the plaintiff filed its affidavit of service. On 20 March 2001 the defendants entered their appearance through their solicitors, Tetuan Amareson and Meera.

On 19 April 2001 the plaintiff filed their application (encl. 15) for summary judgment pursuant to O. 14, of the Rules of the High Court 1980 together with an affidavit in support (encl. 14) affirmed by Rodzi bin Lebai Karim, the Manager of the Loans Management Centre. The contents of the affidavit are a repetition of the plaintiff's averments in the plaintiff's statement of claim.

The plaintiff also exhibited the two letters of offer, the loan agreement cum deed of assignment and the loan agreement as "RLK1", "RLK2", "RLK3" and "RLK4", respectively.

The two notices of demand are also exhibited as "RLK5" and "RLK6", respectively.

The plaintiff relied on a certificate of indebtedness which is exhibited as "RLK7" signed by the Manager of the Loans Management Centre who is also the deponent of the plaintiff's affidavit-in-support, namely, Rodzi bin Lebai Karim.

Encik Rodzi bin Lebai Karim concluded his affidavit-in-support by stating that the defendants did not have any defence to the civil suit.

On 27 April 2001 the defendants filed their statement of defence (encl. 16) in which they admitted that they had taken both the housing loan and revolving loan facility from the plaintiff.

However, they contended that the interest rates which were specified in the two letters of offer and the two loan agreements were subsequently varied without notice. The defendants contended that the plaintiff was required to give notice of each intended variation of the interest rate. Neither did the plaintiff give to the defendants any statement showing how the amount of interest payable was arrived at despite repeated requests from the defendants.

The defendants denied that they defaulted on the monthly repayments of the housing loan and the revolving loan. Instead the defendants contended that they had stopped payment because of the plaintiff's failure to give to the defendants the statement of accounts and also the calculations showing how the amount due was arrived at based on the interest rates charged by the plaintiff.

The defendants denied owing the plaintiff arrears of instalments and interest on the housing loan and revolving loan amounting to RM60,138.64 and RM6,609.21, respectively, as stated in para. 5 of the plaintiff's statement of claim and a sum of RM56,930.26 as stated in the second notice of demand (although the sum mentioned in the second notice of demand is RM65,930.26) and required proof thereof from the plaintiff.

The defendants denied receiving both the two notices of demand. Alternatively, the defendants contended that the notices were in contravention of the requirements of the law.

The defendants denied owing the sums of RM262,289.23 for the housing loan and RM66,609.21 for the revolving loan and the aggregate sum of RM328,898.44.

In their affidavit-in-reply (encl. 17) to the plaintiff's supporting affidavit affirmed by the 1st defendant on 29 May 2001 the defendants adopted the contents of their statement of defence. In addition, the defendants contended as follows:

(1) the imposition of the interest at the varied rate is contrary to law and was never agreed to;

(2) the defendants stopped payment because the plaintiff did not reduce the amount of their indebtedness despite the defendants paying the monthly installments; and

(3) the certificate of indebtedness is not conclusive and cannot be used to prove their indebtedness;

The plaintiff in their affidavit-in-reply (encl. 18) affirmed on 25 June 2001 by Rodzi bin Lebai Karim filed on 25 June 2001 contended that the variation in the interest rate was legally valid because pursuant to the housing loan and revolving loan facility agreements the plaintiff was entitled to vary the interest rate upon giving notice to the defendants and or giving notice by advertisement in the newspaper.

Even if there was such a failure to give notice the defendant were not exempted from paying interest at the varied rate.

The plaintiff had sent to the defendants the statement of accounts every six months and the defendants have never complained that they did not receive the statements.

The two notices of demand were sent to the defendants at their address as stated in the housing loan and revolving loan facility agreements.

The plaintiff denied that the certificate of indebtedness was not conclusive and could not be taken into consideration and required the defendants to prove otherwise.

According to the plaintiff pursuant to cl. 38 of the loan agreement cum deed of assignment and cl. 1 of the loan agreement the statement of indebtedness is final and conclusive.

The plaintiff contended the defendants had failed to raise any triable issue and they had no defence on merits.

In my judgment the defendants have succeeded in raising the following two triable issues:

(1) whether the plaintiff is legally entitled to vary the interest rate in respect of both the loan facilities without giving prior notice to the defendants; and

(2) whether the certificate of indebtedness is a final and conclusive statement of the amounts owed by the defendants.

The court observes that in the 1st letter of offer, dated 10 July 1995 (exh. "RLK1") it is expressly stated that although the interest rate was initially fixed at 9.00% which is 0.5% per annum above the bank's Base Lending Rate (BLR) of 8.50% per annum on that date, the plaintiff is entitled to vary the interest rate at its absolute discretion. It is also expressly stated that the repayment is by 240 fixed equal monthly installments of RM1,703 each commencing one month after full disbursement of the loan and the plaintiff is entitled to vary the installments according to any change in the interest rate at the plaintiff's absolute discretion.

The court also observes that in the second letter of offer dated 5 October 1996 (exh. "RLK2") it is expressly stated that the revolving loan facility of RM60,000 is subject to interest at the rate of 12.25% per annum which is 1.50% above the bank's Base Lending Rate (BLR) of 10.75%. It is also expressly stated that the plaintiff can vary the interest rate at its absolute discretion. It further expressly states that the interest payment is to be made every month upon receipt of debit note. If no interest payment is made it shall be capitalised and added to the principal sums owing.

Miss Jacy Rani has submitted that pursuant to the proviso contained in s. 2 of the loan agreement cum deed of assignment and s. 3.02 of the revolving loan facility agreement the failure or omission of the plaintiff to give notice of any variation in the interest rate does not exempt the defendants from paying interest at the varied rate. Neither did it invalidate the varied interest rate.

This court is, however, not satisfied that pursuant to the proviso to s. 2 of the loan agreement cum deed of assignment in respect of the housing loan exhibited as "RLK3", encl. (14), it is manifestly clear that the plaintiff is legally entitled to vary the interest rate in respect of the housing loan without the necessity for the giving of prior notice to the defendants. The reason is because there are two provisions which precede the proviso which provide that the plaintiff's right to vary the interest rate at its absolute discretion is subject to the serving of a notice in writing on the defendants of its intention to do so and that such amended rate of interest or amended basis of calculation of interest shall be payable or effective as from the date specified in the said notice. (See *Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd* [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467) which was applied in *Credit Corporation (M) Bhd. v. Lucky Height Development Sdn. Bhd & Ors.* [1996] 4 MLJ 556). Further, in respect of any variation in the plaintiff's base lending

rate notice may be given by way of an advertisement in a daily national newspaper or by posting the said notice at prominent places or banks where the plaintiff carries on its business.

The proviso reads as follows:

> PROVIDED ALWAYS that failure on the part of the Lender to give notice in accordance with this clause shall not by itself exempt the Borrower(s) from his/its/their obligation to pay interest in accordance with the amended rates or amended basis of calculation aforesaid.

Although the proviso as set out above has sought to exempt the plaintiff from the requirement to give notice of any intended variation in the interest rate or the basis of calculation of interest it has however omitted to state when will the defendant's obligation to pay interest in accordance with the amended rates or amended basis of calculation arise in the event there is a failure on the part of the plaintiff to give the requisite notice. Therefore, the contention of the defendants that their liability to pay the new rate of interest has not arisen yet cannot be said to be without merits nor that the defendants have not raised any triable issue.

The same applies to s. 3.02 of the loan agreement in respect of the revolving loan facility exhibited as "RLK4", encl. (14) which provides as follows:

> **3.02 VARIATION OF INTEREST RATE**
>
> (a) Notwithstanding the provisions relating to the rate of interest or basis of calculation of interest as hereinbefore provided the Lender shall be entitled at any time and from time to time to vary at its discretion such rate of interest or basis of calculation of interest by serving a notice in writing on the Borrower of such its intention and such amended rate of interest shall be payable or effective as from the date specified in the said notice. Service of such notice may be effected by the Lender by ordinary post or mail to the Borrower's usual or last known place of residence or business or employment or the address above state of the Borrower and such notice shall be deemed to have been effected at the time when the letter serving such notice wold in the ordinary course of post or mail delivered.
>
> (b) Where variation in the manner aforesaid occurs, the amended or new rate of interest shall be payable and/or the amended or new method or basis of calculation of interest shall take effect from the date such amended or new rate of interest is imposed and/or (as the case may be) such amended or new method or basis calculation of interest is stipulated to takes effect and interest be recomputed, if necessary, in accordance with the provisions of this agreement.

(c) the Lender may give notice of change of the rate of interest, or the Prescribed Rate or method of calculation of interest to the Borrower **but failure by the Lender to give notice shall not prejudice or have the effect of invalidating any such variation**. Notice by the Lender may take any form (including by letters) and an advertisement in one issue of a daily national newspaper addressed to the general public is deemed sufficient notice to the Borrower. (emphasis added)

In respect of the second issue the court is satisfied that the certificate of indebtedness (exh. "RLK7") is not conclusive and final because the names of the defendants and the plaintiff are nowhere mentioned in the certificate. Instead the certificate mentions a company by the name of "Homewonders (Malaysia) Sendirian Berhad" owing "Oriental Bank Berhad" the two sums of RM262,289.64 and RM66,609.21.

In order to emphasis this point, the certificate is reproduced below:

LOAN COLLECTION CENTRE
No. 222, 1st Floor, Jalan Jelutong,
11600 PulauPinang
Tel No: 04-293 4030 Fax No: 04-283 4051

CERTIFICATE OF INDEBTEDNESS

I, RODZI BIN LEBAI KARIM (No. K/P: A 1129159) hereby certify that **Homewonders (Malaysia) Sendirian Berhad do owe Oriental Bank Berhad the following amount**:

a) Housing Loan Facility of RM262,289.64 as at 12/2/1999 under Account No. 488845201221.

b) Revolving Credit Facility of RM66,609.21 as at 12/2/1999 under Account No. 488845202313.

-sgd-
RODZI BIN LEBAI KARIM
(Branch Manager) (emphasis added).

The court is unable to accept the submissions of Miss Jacy Rani, the learned counsel for the appellants, that the two errors are mere typographical errors and cannot be construed as manifest errors in the certificate of indebtedness. The legal principle which is applicable is that a certificate of indebtedness is binding on the borrower in the absence of any manifest error. (See *D & C Nomura Merchant Bankers Bhd. v. Gunung Kuari Sdn Bhd & 3 Ors* [1990] 2 CLJ 58; [1990] 1 CLJ (Rep) 752 and *Oriental Bank Bhd. v. Jaafar Sidek &*

Mohd Salam & Ors [1990] 2 CLJ 72; [1990] 2 CLJ (Rep) 585). On the facts of the present case, there are clearly two manifest errors on the face of the certificate.

It follows that since there is a serious dispute in the amounts which are claimed by the plaintiff against the respondents, this is not a fit and proper case for the grant of summary judgment. The plaintiff must prove the quantum of the debt claimed in accordance with the Evidence Act 1950 (See *Chen Heng Ping v. Intradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690).

The learned deputy registrar was, consequently, correct in dismissing the plaintiff's application for summary judgment.